UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

TIMOTHY WEBB,	***)***	
	)	
Petitioner	***)***	
	)	
v.	***)***	***Civil No. 96-174-P-C***
	)	
WARDEN, MAINE CORRECTIONAL CENTER,	***)***	
	)	
	)	
Respondent	***)***	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his pleas of *nolo contendere* in the Maine Superior Court (Kennebec County) to charges of vehicular manslaughter, aggravated assault, operating a motor vehicle under the influence of alcohol, operating a motor vehicle after suspension of his license to do so, and leaving the scene of a personal injury accident. The judgment of conviction on these charges was entered on August 12, 1988. Petition (Docket No. 3) at 2. The petitioner asserts that his plea was coerced, that he was deprived of the effective assistance of counsel, that he was deprived of due process of law in the second revocation of his probation, that his consecutive sentences were unlawfully imposed, and that his sentence deprived him of equal protection of the laws in that he was not treated as were others similarly situated. I recommend that the court deny the petition.

I. Background

The petitioner pleaded *nolo contendere* to the following charges in the Maine Superior Court (Kennebec County) on June 17, 1988: motor vehicle manslaughter, 17-A M.R.S.A. § 203 (Class B); operating a motor vehicle while under the influence of intoxicating liquor ("OUI"), 29 M.R.S.A. § 1313-B (Class D); operating a motor vehicle after suspension, 29 M.R.S.A. § 2184 (Class D); leaving the scene of a personal injury accident, 29 M.R.S.A. § 893 (Class D); and aggravated assault, 17-A M.R.S.A. § 208 (Class B). Indictment, *State v. Webb*, Superior Court, Kennebec County, Docket No. CR-87-490; Transcript of Rule 11/Plea, *State v. Webb*, Docket No. CR-87-490 (June 17, 1988) ("Rule 11 Tr."), at 1, 19. At his sentencing, the petitioner's motion, filed that day, to dismiss his attorney and withdraw his plea was denied. Transcript of Sentencing, *State v. Webb*, Docket No. CR-87-490 (August 12, 1988) ("Sentencing Tr."), at 10-12. He was sentenced on the manslaughter count to ten years imprisonment, with all but eight years suspended, and probation of two years with special conditions; on the OUI count to six months imprisonment, concurrent with the term imposed on the manslaughter count, a $500 fine and a five-year suspension of his license; on the operating-after-suspension and leaving-the-scene counts to six months imprisonment, also concurrent; and on the aggravated assault count to ten years imprisonment, all suspended, consecutive to the sentence imposed on the manslaughter count, with probation of four years with special conditions. *Id.* at 29-32. Judgment was entered on August 12, 1988. Docket Sheet, *State v. Webb*, Superior Court, Kennebec County, Docket No. CR-87-490.

No direct appeal was taken, and no review of the sentence was sought. Accordingly, the judgment of conviction became final on September 1, 1988. M. R. Crim. P. 37(c). The petitioner field a petition for state post-conviction review on September 28, 1988. Docket Sheet, *Webb v. State*, Maine Superior Court, Kennebec County, Docket No. CR-88-473, at 1. This proceeding was

finally resolved by the Law Court's denial of a certificate of probable cause on August 16, 1989. *Id*. at 2. The grounds raised in that petition were ineffective assistance of counsel, error of the trial court in refusing to allow the petitioner to withdraw his *nolo* plea, and breach of the terms of an alleged plea agreement by the state. Petition for Post-Conviction Review, *Webb v. State*, Maine Superior Court, Kennebec County, Docket No. CR-88-473 ("First State Petition"), at 6-8.

The petitioner was released to probation on November 6, 1992. Response to Petition for Writ of Habeas Corpus ("Response") (Docket No. 5) at 3, n.2. On April 20, 1994 his probation was revoked and he was ordered to serve the remaining two years of his sentence on the manslaughter charge. Transcript, Probation Revocation Hearing, *State v. Webb*, Docket No. CR-87-490 (April 20, 1994), at 15. An appeal from this revocation was unsuccessful. *State v. Webb*, Docket No. KEN-94-482 (Me. Feb. 9, 1995), slip op. at 1. He was again released to probation on July 17, 1995. Response at 3, n.2. Probation was again revoked on December 21, 1995, *id*. at 8, and the petitioner remains incarcerated, Petition at 2. No appeal was filed from this second revocation. The petitioner filed a second petition for state post-conviction review on March 5, 1996. Docket Sheet, *Webb v. State*, Maine Superior Court, Kennebec County, Docket No. CR- 96-91. The grounds raised in this petition were ineffective assistance of counsel, violation of his right to due process, unlawful imposition of the sentences, and denial of equal protection. Petition, *Webb v. State*, Docket No. CR-96-91, at 1-6. This proceeding was finally resolved by the Law Court's denial of a certificate of probable cause on May 14, 1996. Docket Sheet, *Webb v. State*, Docket No. CR-96-61. On June 3, 1996 the petitioner filed this action. Docket Nos. 1-3.

II. Procedural Issues

A. Statute of Limitations

The petition in this case was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, which took effect on April 24, 1996. Section 101 of the Act amended 28 U.S.C. § 2244 to provide as follows:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Pub. L. No. 104-132, § 101, 110 Stat. 1214 (Apr. 24, 1996).

The respondent contends that this petition is barred by the statute of limitations set forth above. The petitioner responds only by pointing out that he filed this petition three weeks after resolution of his second state post-conviction review proceeding. That response is insufficient. Allowing for the time during which his first state post-conviction review was pending, as required by the amended subsection (d)(2), this petition was filed long after one year had passed from September 1, 1988. Filing a second state petition for post-conviction review in 1996, long after the limitations period had expired, cannot serve to start the limitations period running anew.

However, that fact does not end the inquiry. The Constitution requires that statutes of limitation allow a reasonable time after they take effect for the commencement of suits upon existing causes of action. *Texaco, Inc. v. Short*, 454 U.S. 516, 527 n.21 (1982). *See also Block v. North Dakota*, 461 U.S. 273, 286 n.23 (1983) (applying same requirement to state statutes). Finding that it would be inequitable and prejudicial to apply a new statute of limitations to a habeas claim that accrued prior to the announcement of the new rule without providing a grace period in which to file a petition on such a claim, two federal district courts have found that a grace period in the amount of the new limitation period would be reasonable. *Duarte v. Hershberger*, 1996 WL 699522 (D. N. J. Dec. 2, 1996), at *3; *Flowers v. Hanks*, 941 F. Supp. 765, 771 (N. D. Ind. 1996). Thus, claims brought under section 2254 would not be barred by the new statute of limitations if filed on or before April 23, 1997. I find the reasoning of these courts to be persuasive. Accordingly, I conclude that Webb's claim, filed on June 3, 1996, is not barred by the April 24, 1996 amendment to section 2254.

B. Procedural Default

The respondent contends that the petitioner's claims concerning due process, unlawful imposition of the sentences, and equal protection are procedurally defaulted due to his failure to raise them in appropriate state court proceedings.[1] The respondent relies on *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992), and *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), to support his argument that the petitioner has failed to demonstrate cause for this default and prejudice to his case.

[1] If these claims could have been raised in the petitioner's first post-conviction review proceeding, they may not be addressed in a subsequent state post-conviction review. 15 M.R.S.A. § 2128(3); *McEachern v. State*, 456 A.2d 886, 889 (Me. 1983). The claim concerning the second probation revocation proceeding arose only after the resolution of the first post-conviction review proceeding, so that claim was not barred from the second petition by section 2128(3). Petition, *Webb v. State*, Docket No. CR-96-91, at 2-3.

The petitioner's due process claim is that he was not given adequate notice of the terms of his probation before being charged with the second probation violation in 1995 and that he was not offered a preliminary hearing in the process of that probation revocation proceeding. Petition at 6. These claims could have been raised during the probation revocation proceeding and on appeal from the judgment revoking his probation in 1995. The court has not been provided with a transcript of the December 1995 probation revocation hearing,[2] but it is clear that the petitioner did not take an appeal from the resulting decision. Such an appeal is authorized by 15 M.R.S.A. § 2115 and M. R. Crim. P. 37 ("[w]henever a judgment, order or ruling of the Superior Court is by law reviewable by the Law Court, such review *shall be* by appeal") (emphasis added).

The petitioner's claims concerning the 1988 sentences are that the imposition of the sentence on the aggravated assault charge as consecutive to rather than concurrent with the sentences on the other charges was unlawful, that the term of probation was in excess of the statutory maximum for Class B offenses, and that the sentencing judge wrongfully imposed the statutory maximum sentence, apparently on both the manslaughter and the assault charges, because the petitioner had no prior felony convictions and "a minimum misdemeanor criminal history." Petition at 8-9. These claims could have been raised by the petitioner in an appeal to the Law Court under 15 M.R.S.A. § 2141 (now 15 M.R.S.A. § 2151) and M. R. Crim. P. 40, or in a proceeding in the Maine Superior Court to correct an illegal sentence under M. R. Crim. P. 35(a). The petitioner did neither.

The petitioner's equal protection claim is that he was treated differently from others sentenced for vehicular manslaughter, citing statistics that from 1983 to 1989 the average sentence

[2] The petitioner states that he admitted violating the conditions of his probation at this hearing and entered into a plea agreement. Amendment to Petition for Writ of Habeas Corpus (Docket No. 8) at 3.

for this crime was five years and from 1989 to 1991 the average sentence was seven years. The petitioner was sentenced to ten years, two of which were initially suspended. This constitutional claim could also have been raised in proceedings under 15 M.R.S.A. § 2141 and M. R. Crim. P. 35(a) and 40, but was not.

"Where the petitioner -- whether a state or federal prisoner -- failed properly to raise his claim on direct review, the writ is available only if the petitioner establishes 'cause' for the waiver and shows 'actual prejudice resulting from the alleged . . . violation.'" *Reed v. Farley*, 114 S.Ct. 2291, 2300 (1994) (quoting *Wainwright*, 433 U.S. at 84). *See also Gilday v. Callahan*, 59 F.3d 257, 273 (1st Cir. 1995), *cert. denied* 116 S.Ct. 1269 (1996). Webb must therefore establish cause for his waivers in state court and show that actual prejudice resulted. His petition suggests cause only for the failure to appeal the legality of the sentences, contending that this failure was the fault of his counsel. Petition at 5. Therefore, this court may not consider further the claim arising from the second probation revocation proceeding or the equal protection claim.[3]

A claim of ineffectiveness of counsel as "cause" for failure to raise a claim in state appeal procedures must "be presented to the state courts as an independent claim" before it may be considered by the federal courts on collateral review. *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). The petitioner did raise this as an independent claim of ineffective assistance of counsel in his first state post-conviction review. Amended First State Petition (November 28, 1988) at 1.

[3] In any event, these claims are without merit. The petitioner was fully informed of the terms of his probation at the time of sentencing. Sentencing Tr. at 29-30. No preliminary hearing is required in a probation revocation proceeding. *State v. Chamberland*, 499 A.2d 143, 144 (Me. 1985). And the mere fact that other individuals convicted of the same crime received different sentences does not constitute a denial of equal protection. *United States v. Murphy*, 480 F.2d 256, 261 (1st Cir. 1973).

Relying on *Carsetti v. State of Maine*, 932 F.2d 1007, 1009 (1st Cir. 1991), the petitioner argues that he is not procedurally defaulted because no Maine court has said so.

In *Carsetti*, the First Circuit responded to the Supreme Court's holding in *Harris v. Reed*, 489 U.S. 255 (1989), that a procedural default in state court does not bar federal habeas consideration "unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." 489 U.S. at 263 (citation omitted). The First Circuit held that an order of the Law Court denying a certificate of probable cause identical to that issued by the Law Court on this petitioner's post-conviction claim did not make such a clear and express statement. 932 F.2d at 1010. Thus, consideration of the petitioner's claim is available on federal habeas review.

However, this court need not determine whether the petitioner has established cause for his procedural default because he cannot show, in any event, that he was actually prejudiced by the failure to seek review of the sentences on the grounds that he raises here. *See United States v. Frady*, 456 U.S. 152, 168 (1982). A review of the sentences on appeal would not have necessarily resulted in remand for resentencing. Contrary to the petitioner's claims, the sentences imposed in 1988 did not violate 17-A M.R.S.A. § 1256 or any precept of Maine common law. The sentence for manslaughter and the sentence for aggravated assault were imposed to run consecutively because, as the sentencing judge stated, the seriousness of the criminal conduct involved required consecutive sentences, as permitted by section 1256(2)(D). Sentencing Tr. at 26-31. None of the factors precluding consecutive sentences listed in section 1256(3) was present in the petitioner's criminal case. The petitioner could not have been prejudiced by a failure to appeal on the grounds that the sentences were unlawful when they were in fact clearly lawful.

The petitioner's additional claim, that the combined term of probation imposed on the manslaughter and assault counts was unlawful under 17-A M.R.S.A. § 1202(1) because it exceeded the statutory maximum, is incorrect. Section 1202 merely states the maximum period of probation for conviction of a Class B crime; the petitioner was placed on probation on the manslaughter conviction for a period of two years and on the aggravated assault conviction for a period of four years, both within the statutory limits. The entire sentence on the assault conviction was suspended, leaving only the probation to be served. The fact that a defendant is sentenced for conviction of more than one crime on the same day, or arising out of the same events, does not mean that the terms of probation imposed on those crimes must be added together for purposes of the statutory limit. The petitioner cites no authority for this inherently illogical interpretation of section 1202. He could not have been prejudiced by the imposition of two perfectly legal terms of probation.

Citing case law discussing the imposition of sentence in Class A crimes, the petitioner asserts that he should not have been sentenced to the maximum term of ten years on the Class B manslaughter conviction because he had no prior felony convictions. The sentencing court must determine the sentence to be given by consideration of the particular nature and seriousness of the offense. *State v. Gallant*, 600 A.2d 830, 831 (Me. 1991). Here, the petitioner caused the death of another person while driving on the wrong side of the road under the influence of alcohol. Rule 11 Tr. at 9-17 (summary of state's evidence). The petitioner did have past convictions for driving under the influence and he was operating a vehicle while his license to do so was suspended when he caused the accident. These are clearly aggravating factors, as the sentencing court noted. Sentencing Tr. at 26-28. *See State v. Bolduc*, 638 A.2d 725, 727 (Me. 1994). There was no error in the imposition of the sentence for the manslaughter conviction; the petitioner could not show prejudice

from the fact that no appeal was taken on this point.

As the petitioner points out, a procedural default may still be excused, even in the absence of a showing of cause and prejudice, where the failure to hear the claim would result in a "fundamental miscarriage of justice." *Murray*, 477 U.S.at 495-96. This exception applies only where a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id*. at 496. Webb does not assert that he is actually innocent; therefore, he presents no basis for this court to consider this exception. *Ortiz v. Dubois*, 19 F.3d 708, 714 (1st Cir. 1994).

III. Other Claims

Remaining for discussion are the petitioner's claims that his plea was coerced and that he received ineffective assistance of counsel in the 1988 proceeding. The respondent contends that these claims were raised in the petitioner's first state post-conviction review proceeding and were fully and fairly litigated there, including an appeal to the Law Court, and that the result was correct, basing its argument on a reference to the language added to section 2254(d) by the Anti-Terrorism and Effective Death Penalty Act.

While the current petition refers to the plea as having been "coerced," Petition at 5, and the second amended petition in the first state post-conviction review proceeding uses the term "involuntary," Second Amended First State Petition (March 7, 1989) at 1, the substance of the claims concerning the plea is the same. The same is true regarding the claim of ineffective assistance of counsel. *Compare* Petition at 5 (failure to appeal legality of sentence and to preserve adequate record for appeal) *with* Amended First State Petition (November 28, 1988) at 1 (failure to adequately advise petitioner of options relative to appellate review of sentence, or to file for such review). The petitioner responds that only the claim concerning the plea was addressed by the

written decision on the first state post-conviction review, a decision with which he obviously disagrees, and that the claim concerning ineffective assistance of counsel therefore cannot be considered to have been fully litigated.

Because both claims were raised in the petition below, the claim of ineffective assistance of counsel was clearly presented to the Superior Court through testimony in that proceeding, Transcript, Post-Conviction Review, *Webb v. State,* Docket No. CR-88-473 (April 5, 1989) ("Post-Conviction Tr."), at 3-30, 55-86; the post-hearing briefs of both parties mentioned the issue of ineffective assistance, State's Post-Hearing Memorandum of Law, *Webb v. State*, Docket No. CR-88-473, at 1; [Petitioner's] Post-Hearing Memorandum: Argument, *Webb v. State,* Docket No. CR-88-473, at 4-5; and the Superior Court ordered that "[t]he petition for post-conviction relief is DENIED," Order, *Webb v. State*, Docket No. CR-88-473, at 3, the exhaustion requirement of 28 U.S.C. § 2254(b) and (c) has been met. The two claims were adjudicated on their merits in the state court.

Application of the new standards for review of such claims added to section 2254(d) by the Antiterrorism Act[4] requires denial of the petition. The petitioner has not shown that the decision below, on either claim, resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or that it resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court

[4] After the amendment, section 2254(d) reads as follows:
An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

proceeding.

Application of the standard for review that prevailed before the amendment of section 2254(d) would yield the same result. As to the claim that the plea was coerced, on which a determination was made by the state court after a hearing on the merits, the petitioner has not met the requirements of any of the former subsections (1) - (8) of section 2254(d). Therefore, habeas relief is unavailable on that claim.

As to the claim of ineffective assistance of counsel, it is not entirely clear from the record that the state court did determine the merits of that issue in the first post-conviction review proceeding. A review of that claim on its merits is therefore in order.

Claims of constitutionally deficient performance by counsel are reviewed under the test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The petitioner must demonstrate both that his attorney's performance was unreasonably deficient and that he was prejudiced as a result of it. *See Scarpa v. Dubois*, 38 F.3d 1, 8 (1st Cir. 1994). The first element "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The second element "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. The petitioner's claims concerning his attorney arise out of the failure to appeal his sentence, to preserve an adequate record for appeal, to file an appeal from the denial of the petitioner's motion to withdraw his plea, and to seek leave to withdraw as the petitioner's counsel before or during the sentencing hearing.

Significantly, the petitioner does not assert that he asked his counsel to file an appeal. The petitioner did file a *pro se* motion to dismiss his counsel, along with his motion to withdraw his plea,

on August 8, 1988, four days before the sentencing hearing. Docket Sheet, *State v. Webb*, Docket No. CR-87-490, at 1-2. Both of these motions were denied at the hearing. Sentencing Tr. at 12. The petitioner was advised at the end of the sentencing hearing of his right to appeal the sentence and the time period in which that appeal must be filed. *Id.* at 32. He testified that he understood this information, Post-Conviction Tr. at 70-71, but that he decided not to appeal his sentence, based on some advice from a paralegal, *id*. at 86.

Under these factual circumstances, the failure of the petitioner's sentencing counsel to move for leave to withdraw could not have prejudiced the petitioner, because his own motion to the same effect was denied by the court. In addition, there is no way in which the petitioner could have been prejudiced by a failure to preserve an adequate record for appeal, a vague and unspecific claim, when no appeal was taken. Since an appeal from the sentence and the denial of the motion to withdraw the plea would have been subject to the same time limits and would have been taken together, the remaining specific allegations will be considered together.

If a habeas petitioner can show that he asked his counsel to take an appeal and his counsel subsequently failed to take the appeal or to perfect the appeal, the conduct is prejudicial under the *Strickland* standard, regardless of the merits of the appeal. *Bonneau v. United States*, 961 F.2d 17, 23 (1st Cir. 1992). Here, however, the petitioner has made no such showing. To the contrary, he chose not to file an appeal, albeit based on the advice of a paralegal. The petitioner's testimony and that of his sentencing counsel differ concerning whether his counsel discussed the possibility of appeal with him. *Compare* Post-Conviction Tr. at 26-27, 32 (counsel testifies that he discussed right to appeal and time limit applicable to both sentence and motion to withdraw plea with petitioner immediately after sentencing hearing) *with id*. at 70, 83 (petitioner denies in testimony that

sentencing counsel spoke to him at all during or after sentencing hearing). But that is not the issue here. The issue is whether the petitioner's failure to appeal was voluntary.

A defendant cannot revive rights lost by a voluntary failure to appeal in a habeas proceeding. *Lopez-Torres v. United States*, 876 F.2d 4, 5 (1st Cir. 1989). The burden is on the petitioner in this proceeding to show that the failure to appeal of which he complains was not voluntary. *Ansong v. District Dir. of Immigration*, 596 F. Supp. 882, 887 (D. Me. 1984) (burden of proof in habeas proceeding rests with petitioner). The only evidence in this record is to the contrary. Therefore, there is no showing of prejudice, and habeas relief is not available on the claim of ineffective assistance of counsel as set forth in the petition.

IV. Conclusion

For the foregoing reasons, I recommend that the petition for a writ of habeas corpus be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 28th day of January, 1997.

_____

David M. Cohen
United States Magistrate Judge